



FILED
FEDERAL ELECTION
COMMISSION

2012 SEP 21 PM 1:42

OFFICE OF GENERAL
COUNSEL

Lee A. Saunders
President

Laura M. Reyes
Secretary-Treasurer

John C. Dempsey
General Counsel

Margaret A. McCann
Paula J. Cairns
Nicole R. Pollard
Jessica Robinson
Michael L. Aris
Nicholas A. Serrano
Associate General Counsel

General Counsel's Office

September 7, 2012

By Hand Delivery, Email & U.S. Mail

Anthony Herman, Esq.
General Counsel
Office of the General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

**Re: MUR 6617 (Response of the American Federation of State, County
& Municipal Employees, AFL-CIO)**

Dear Mr. Herman:

This submission on behalf of American Federation of State, County & Municipal Employees, AFL-CIO ("AFSCME" or "Respondent") responds to the July 25, 2012 complaint filed by James Black ("Complainant") in the above-referenced matter.

Complainant alleges that AFSCME, a labor organization, violated 11 C.F.R. § 109.23 and, therefore, made an unlawful and excessive in-kind contribution to Christie Vilsack for Iowa, Inc. (the "Committee"), by including in an AFSCME independent expenditure brief snippets of a Committee internet communication that was publicly-available on youtube.com. As explained below, because AFSCME's incidental use of these snippets does not violate 11 C.F.R. § 109.23, the Commission should find that there is no reason to believe that AFSCME violated the Federal Election Campaign Act of 1971, 2 U.S.C. § 431 *et seq.* ("FECA" or the "Act") or the Commission's implementing regulations.

FACTS

AFSCME is a labor organization whose 1.6 million members are employed as nurses, corrections officers, child care providers, sanitation workers, first responders, social workers and in hundreds of other public service occupations. As a means of fulfilling its constitutional objectives,¹ AFSCME engages both its members and the general public with respect to federal, state and local public policy issues, candidates, and officeholders with the goals of promoting the rights of workers to organize and

¹ See, Int'l. Const., American Federation of State, County & Municipal Employees, at Art. II., § B (2010).

American Federation of State, County and Municipal Employees, AFL-CIO

TEL (202) 775-5900 FAX (202) 452-0556 1101 17th Street, NW, Suite 900, Washington, DC 20036

bargain collectively, to improve the lives of AFSCME's members and other working families, and to foster active participation in our democracy.

On July 23, 2012, AFSCME began running a 30-second independent expenditure entitled "More of That" (the "Ad")² on television in Iowa.³ The Ad was in support of Christie Vilsack, a candidate for Congress in Iowa's Fourth Congressional District. The Ad included four (4) brief snippets totaling about eleven (11) seconds of video from a 108-second publicly available internet communication (the "Vilsack Video") that was posted on youtube.com, presumably by the Committee.⁴ The video snippets used in the Ad include a 5-second clip of a playground scene in which Vilsack appears, a 2-second clip of Vilsack speaking with a man who appears to be a farmer, another 1-second clip of her speaking to the same man, and a 3-second clip of Vilsack walking in a rural setting.

The AFSCME Ad, including the snippets from the Vilsack Video as they appeared in the Ad, differed substantially from the Vilsack Video. None of snippets of the Vilsack Video that appeared in the AFSCME Ad was presented in a manner that was identical to the Vilsack Video. AFSCME's media consultant altered each of the four (4) snippets included in the Ad by cropping and enlarging them. All graphics that appeared on screen in the Vilsack Video were excluded from the Ad, and new graphics were used on the snippets in the AFSCME Ad. The snippets were presented in the AFSCME Ad in a different order than they appeared in the Vilsack Video, and in the AFSCME Ad they were interspersed with video that did not appear in the Vilsack Video. In fact, the brief snippets from the Vilsack Video accounted for only about one-third of the visual content of the Ad. No audio from the Vilsack Video (including any audio used with the Vilsack Video version of the snippets) was used in the AFSCME Ad. Instead, the Ad used its own audio that conveyed a message different from that of the Vilsack Video.

Other than by alleging that AFSCME violated 11 C.F.R. § 109.23 by using the snippets of the Vilsack Video, Respondent does not allege (and there is no evidence to conclude) that the Ad is a coordinated communication as defined at 11 C.F.R. § 109.21. Indeed, all AFSCME employees and agents (including any consultants) performing any work related to the Ad were subject to and abided by AFSCME's written firewall policy which complies with 11 C.F.R. 109.21(h).⁵

AFSCME did not seek permission from Christie Vilsack, the Committee or an agent of either to use the snippets. Rather, AFSCME's media consultant obtained the snippets of video footage from the Vilsack Video that were used in the AFSCME Ad by accessing a public website

² See <http://www.youtube.com/watch?v=tN41WZFt-7c>.

³ This Ad was the same as independent expenditures paid for by House Majority PAC and SEIU COPE, except for the required disclaimers. AFSCME, House Majority PAC and SEIU COPE used the same media consultant to produce their respective independent expenditures, and each organization paid its own production costs and purchased its own television time for the independent expenditures.

⁴ See http://www.youtube.com/watch?v=YLo7GqhQFEM&feature=player_detailpage

⁵ Because Complainant does not allege, and there is no evidence to indicate, that AFSCME violated the Commission's Coordinated Communications regulation other than by republishing campaign materials as prohibited by 11 C.F.R. § 109.23, AFSCME finds it unnecessary to submit information relating to its compliance with 11 C.F.R. § 109.21. However, if the Commission requires such information, AFSCME will provide it upon request.

13044344270

and used them without the knowledge or consent of Christie Vilsack, the Committee or an agent of either.⁶

AFSCME'S INCIDENTAL USE OF THE VILSACK VIDEO SNIPPETS DOES NOT VIOLATE THE COMMISSION'S REPUBLICATION PROHIBITION.

AFSCME's use of the brief snippets from the Vilsack Video is not a republication of candidate materials within the meaning of 11 C.F.R. § 109.23. Even if AFSCME's use of the snippets in the Ad were a republication of candidate materials, that use fits squarely within an exception to the republication prohibition. AFSCME's use of the snippets from the Vilsack Video accord with the Commission's precedents dismissing complaints of violations of 11 C.F.R. § 102.23, and the complaint in this matter should also be dismissed.

a. AFSCME's Use of the Vilsack Video Snippets Is Not a Republication of Campaign Materials as Contemplated by the Act and Commission Regulations, and Accords with the Commission's Precedents on 11 C.F.R. § 109.23.

The Commission's regulations provide that, with certain exceptions, the "financing of the dissemination, distribution or republication, in whole or in part, of any ... campaign materials prepared by the candidate, the candidate's authorized committee, or an agent of either of the foregoing shall be a contribution" subject to the Act's contribution limits and reporting requirements with respect to the person paying for the dissemination, distribution or republication of the campaign materials. See 11 C.F.R. § 109.23(a). AFSCME's use of the snippets to create its own communication does not amount to a prohibited republication of the Committee's campaign materials as contemplated by the Act and Commission regulations.

First, it is apparent that AFSCME's use of brief snippets amounting to such a small portion – approximately eleven (11) seconds – of the Vilsack Video in the 30-second Ad is an incidental use that should not be treated as a republication of campaign materials. In MUR 6357 (American Crossroads), a case substantially similar to the one at hand, the Commission did not find reason to believe that an organization republished campaign material when it used in its independent expenditure multiple brief snippets (totaling up to 15 seconds) of video footage of a candidate that had been posted to a publicly-accessible website, presumably by the candidate's campaign. Three (3) Commissioners reasoned that downloading such material for incidental use in a larger communication that was designed, created and paid for without any coordination with a candidate does not violate 11 C.F.R. § 109.23. See MUR 6357 (American Crossroads), Statement of Reasons of Commissioners Hunter, McGahn and Petersen (adopting the rationale set forth by Commissioners von Spakovsky and Weintraub in their Statement of Reasons in MUR 5743 (Betty Sutton for Congress)).

Likewise, in MUR 5743 (Betty Sutton for Congress), the Commission dismissed a complaint against EMILY's List that alleged that EMILY's List's use in its independent

⁶ It is AFSCME's position that its use of the Vilsack Video snippets in the Ad is a "fair use" and does not violate the Copyright Act of 1976, 17 U.S.C. § 101 *et seq.*

13044344271

expenditures of publicly-available photos from a candidate's website amounted to an in-kind contribution to the candidate.⁷ In their Statement of Reasons in that MUR, Commissioners von Spakovsky and Weintraub noted that the candidate materials used by EMILY's List "comprise only a small portion of the mailers, and are surrounded by EMILY's List's own text and design." And, because the candidate materials reproduced in EMILY's List's independent expenditure were obtained from a website and were used "only as an incidental portion of the document being disseminated," Commissioners von Spakovsky and Weintraub determined that a finding that the independent expenditure was a republication of campaign materials was unwarranted. See MUR 5743 (Betty Sutton for Congress), Statement of Reasons of Commissioners von Spakovsky and Weintraub.

In another similar case, MUR 5996 (Tim Bee for Congress), the Commission did not find reason to believe that an organization republished campaign materials when it downloaded a photo of the candidate from the candidate's website and used that photo for about two (2) seconds at the end of the organization's television advertisement. As Commissioners Petersen, Hunter, and McGahn pointed out in their Statement of Reasons in that MUR, such an incidental use of publicly-available material from a candidate's website is "not the type of 'republication of campaign materials' contemplated by the Act and Commission regulations. The traditional type of republication involves the reprinting and dissemination of a candidate's mailers, brochures, yard signs, billboards, or posters—in other words, materials that copy and convey a campaign's message." As in that MUR, the use of downloaded materials at issue here is not the type of "republication of campaign materials" contemplated by the Act and Commission regulations.

Second, although the snippets used in the AFSCME Ad were derived from the Vilsack Video, their appearance and presentation was markedly different from that of Vilsack Video from which they originated. None of the audio portion of the Vilsack Video snippets was used in the AFSCME Ad. And while the video portion of the snippets as they appeared in the AFSCME Ad looks similar to the snippets of the Vilsack Video from which they originated, *they are not the same*. Each of the video snippets was cropped, enlarged and overlaid with new on-screen graphics before being included in the Ad. Moreover, the Ad does not repeat the entire (or even a substantial portion of) the 108-second Vilsack Video. But, even taken individually, none of the snippets amounts to a republication of campaign material.

Similarly, in MUR 6357 (American Crossroads), the independent expenditure at issue had an "overall audio and visual presentation" that was "wholly different from" the candidate materials obtained from youtube.com. As with AFSCME's Ad, the American Crossroads ad contained only a "few fleeting images" from the candidate's on-line video, and it contained "its own text, graphics, audio and narration to create its own message." See MUR 6357 (American Crossroads), Statement of Reasons of Commissioners Hunter, McGahn and Petersen. Like the American Crossroads ad, the AFSCME Ad — "neither in whole nor in substantial part — is anything close to a carbon copy of" the candidate's video. See *id.* In paying for the Ad,

⁷ The Commission did vote to send a letter of admonishment to EMILY's List for its use of the candidate's photos. However, because the Act does not empower the Commission to admonish respondents, the Commission's vote in MUR 5743 amounts to a dismissal.

13044344272

AFSCME did not "subsidize a candidate's campaign by expanding the distribution of communications whose content, format and overall message are devised by the candidate." *Id.* Therefore, the instant situation is not one that the Act's republication provisions were meant to capture, and there is no reason to believe that AFSCME violated 11 C.F.R. § 109.23.

b. Even if AFSCME's Use of the Vilsack Video Snippets Is a Republication, that Use Falls within the "Brief Quote" Exception to 11 C.F.R. § 109.23(a).

The Commission's regulations contain five (5) exceptions to the prohibition on republication of candidate materials. See 11 C.F.R. § 109.23(b). One of those exceptions provides that the use of a "brief quote of materials that demonstrate a candidate's position as part of a person's expression of his own views" is not a contribution to that candidate. See 11 C.F.R. § 109.23(b)(4). AFSCME's use of the four (4) brief excerpts from the Vilsack Video qualifies for this exception.

The Commission has characterized the benefits that flow from the exception at 11 C.F.R. § 109.23(b)(4) as "the same as would flow from a fair use exception[.]" See *Final Rules on Coordinated and Independent Expenditures*, 68 Fed. Reg. 421, 443 (Jan. 3, 2003). In MUR 6357 (American Crossroads), Commissioners Hunter, McGahn and Petersen agreed with American Crossroads that the use of brief video snippets from a candidate's materials constitutes a "quote" and fits within the except at 11 C.F.R. § 109.23(b)(4). See MUR 6357 (American Crossroads), Statement of Reasons of Commissioners Hunter, McGahn and Petersen. And, in MUR 5743 (Betty Sutton for Congress), Commissioners von Spakovsky and Weintraub observed that 11 C.F.R. § 109.23(b)(4) "appears to contemplate exempting from regulation the incidental use of campaign materials to further one's own independent communications." See MUR 5743 (Betty Sutton for Congress), Statement of Reasons of Commissioners von Spakovsky and Weintraub. Because AFSCME's use of brief quotes of the visual material in the Vilsack Video is an "incidental use of campaign materials to further [AFSCME's] own independent expenditures, it falls within the "brief quotes" exception to 11 C.F.R. 109.23(a) and is entitled to the fair use benefits that flow from that exception.

A. CONCLUSION

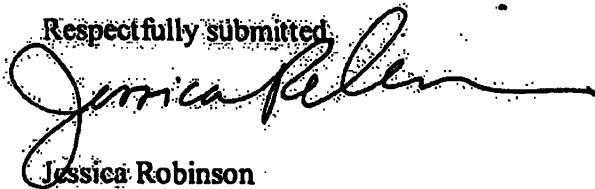
As state above, AFSCME's use of brief snippets of the Vilsack Video does not amount to a republication of campaign materials as contemplated by the Act or Commission regulations, and accords with Commission precedent dismissing allegations of campaign material republication in similar cases. And, even if AFSCME's use of the Vilsack Video snippets were a republication, that use is subject to the "brief quote" exception at 11 C.F.R. § 109.23. Thus, the AFSCME Ad is an independent expenditure and is not an in-kind contribution to the Committee.

For the foregoing reasons, AFSCME respectfully requests that the Commission find that there is no reason to believe that AFSCME violated the Act or the Commission's implementing regulations and close this matter.

13044344273

Mr. Anthony Herman
September 7, 2012
Page 6

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Jessica Robinson", written over the typed name.

Jessica Robinson
Associate General Counsel

JR:lb

cc: Jack Dempsey

13044344274